IN THE

Supreme Court of the United States

October Term, 1956

No. [redacted]97

UNITED STATES OF AMERICA, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF IN OPPOSITION.

LOUIS W. MYERS,
WILLIAM W. CLARY,
WARREN M. CHRISTOPHER,
433 South Spring Street,
Los Angeles 13, California,
JOHN U. LOOMIS,
202 East 18th Street,
Cheyenne, Wyoming,
Attorneys for Respondent.

FRANK E. BARNETT,
W. R. ROUSE,
J. H. ANDERSON,
Of Counsel.

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BRIEF IN OPPOSITION.

Opinions Below.

The opinion of the District Court [R. 8-12] is reported at 126 F. Supp. 646. The opinion of the Court of Appeals (Pet. App. A, pp. 16-25) is reported at 230 F. 2d 690.

Jurisdiction.

The judgment of the Court of Appeals (Pet. App. A, p. 26) was entered on February 24, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Was the court below correct in holding that the Act of July 1, 1862, granting Union Pacific "the right of way through the public lands . . . for the construction of said railroad and telegraph line" conveyed a limited fee which entitles the railroad to develop and take the minerals underlying the right of way.

Statute Involved.

The pertinent portions of the Act of July 1, 1862, 12 Stat. 489, are set forth in the petition, pages 2-3.

Statement.

Petitioner's statement adequately frames the legal issue before the Court in this case.

Argument.

1. The decision of the Court of Appeals is not in conflict with decisions of this Court or any other court of appeals. Indeed, petitioner asserts no such conflict. In view of the fact that nearly a century has elapsed since the right of way was granted to Union Pacific in 1862, the absence of a conflict of decision indicates that there is no pressing need for this Court to review the unanimous conclusion of the judges of the courts below.

2. The decision of the court below was clearly foreshadowed by *Great Northern Ry. Co. v. United States,* 315 U. S. 262. There, this Court comprehensively reviewed the Nineteenth Century railroad grants and concluded that the year 1871 marked a "sharp change in Congressional policy with respect to railroad grants." 315 U. S. at 275. Post-1871 right of way grants, such as those authorized by the general right of way act of 1875 which was in issue in *Great Northern,* were held to convey only easements, with the result that the underlying minerals did not pass to the grantees.

The Court recognized, however, that the pre-1871 right of way grants fall into a different category. The Court pointed out that such rights of way, including that granted to Union Pacific in the Act of July 1, 1862, have "been held to be limited fees." 315 U. S. at 273, n. 6. Indeed, the Court noted that "when Congress made outright grants to a railroad of alternate sections of public lands along the right of way" as it did in the pre-1871 grants,

"there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." 315 U. S. at 278. In view of the analysis in *Great Northern*, the court below was right in concluding that, if the Supreme Court had "been considering right of way grants made prior to 1871, it would have followed the 'limited fee' cases and held that such title carried with it the right to remove the minerals" (Pet. App. A, p. 23).

The significance of *Great Northern* as well as the correctness of the decision of the court below is shown by the only other Court of Appeals decision involving the right to minerals under a pre-1871 right of way, *United States v. Illinois Central R. Co.*, 187 F. 2d 374 (7th Cir. 1951), affirming 89 F. Supp. 17 (E. D. Ill. 1949). The Illinois Central right of way grant was made in 1850 and was identical in all pertinent respects to the Union Pacific right of way grant. In *Illinois Central*, the Court of Appeals unanimously affirmed the District Court which had held, on the authority of *Great Northern* and earlier decisions of this Court, that the railroad was entitled to take the minerals underlying its right of way.

3. The decision of the court below is so clearly correct as not to warrant review in this Court. The conclusion that the pre-1871 right of way grants conveyed a limited fee is firmly established by decisions of this Court. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 271 (1864 right of way grant to Northern Pacific conveyed "limited fee"); see *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 117 (1866 right of way grant "was absolute in terms, covering both the fee and possession"); *New Mexico v. United States Trust Co.*, 172 U. S. 171 (1866 right of way grant to Atlantic and

Pacific Railroad held to be a fee, not an easement);* *Clairmont v. United States,* 225 U. S. 551, 556 (by 1864 grant, Northern Pacific "obtained the fee in the land constituting the 'right of way'"). Moreover, in *Union Pacific R. Co. v. Snow,* 231 U. S. 204, and *Union Pacific R. Co. v. Sides,* 231 U. S. 213, this Court upheld state court judgments which decreed that under its 1862 grant Union Pacific is "the owner in fee and entitled to the possession of each and every part" of its right of way.**

The nature of the pre-1871 right of way grants was explained in *Townsend* where the Court said that the grant was "made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" and that "the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." 190 U. S. at 271. Similarly, in *Railroad Company v. Baldwin,* 103 U. S. 426, 429-430, which involved the right of way granted in 1866 to the St. Joseph & Denver City Railroad, the Court said that "It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed." These cases show that peti-

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*In the *New Mexico* case, the Court pointed out that the term "right of way" does not necessarily mean the right of passage only, and that when applied to railroads, it is frequently used to describe the strip of land upon which the railroad is constructed, which may be owned in fee. 172 U. S. at 181-182.

**The trial court judgments in the *Snow* and *Sides* cases, while not set forth in this Court's opinions, were contained in the records on appeal and were thus before the Court. *Union Pacific R. Co. v. Snow* [R. 16]; *Union Pacific R. Co. v. Sides* [R. 16].

tioner is incorrect in asserting (p. 8 n.) that "this Court has never stated to what extent the 'fee' is limited." They demonstrate, on the contrary, that the term "limited fee" (or its equivalent, a base, qualified or determinable fee) was used by the courts in accordance with its definite and long established meaning to refer to an estate in fee simple which will continue until the occurrence of a stated event, at which time the estate may revert to the grantor. See Kent's Commentaries (12th ed. 1873), Vol. 4, p. 10; Blackstone's Commentaries (9th ed. 1783), Vol. 2, pp. 109-110; Restatement of Property, Sec. 23, Illus. 4.

As the Court of Appeals correctly held, the owner of such a limited fee, so long as the estate exists, has the same rights as an owner in fee simple and may remove the underlying minerals. *E. g., United States v. Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill. 1949), aff'd, 187 F. 2d 374 (7th Cir. 1951); *Davis v. Skipper*, 125 Tex. 364, 83 S. W. 2d 318 (1935); see *Johnson Irrigation Co. v. Ivory*, 46 Wyo. 221, 24 P. 2d 1053, 1058 (1933); Restatement of Property, Sec. 193, Comment h; 19 Am. Jur., Estates, Secs. 28, 30, 31. Petitioner's attempt (p. 6) to discount this rule as one of the "technicalities of private real estate law" is refuted by decisions of this Court which established the limited fee principle. The consequences which flow from the nature of the estate held by Union Pacific are decisive here, just as they were in such cases as *New Mexico v. United States Trust Co.*, 172 U. S. 171, where exemption from taxation was the consequence of the holding that the right of way was

granted in fee, and *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, where the nature of the railroad's limited fee estate was held to prevent adverse possession.*

Petitioner's suggestion (p. 6) that the limited fee cases are somehow inapplicable because the United States was not a party** overlooks the fact that these decisions construing federal statutes are based on legal principles which apply to the United States as well as private parties. There are, of course, special doctrines favoring the United States in particular instances,*** but there is no basis for a suggestion that the United States is governed only by those legal principles which happen to have been established or applied in cases in which it was a party.

Petitioner's further argument (pp. 6-7) that the limited fee cases can be ignored because minerals were not in issue is answered in the *New Mexico* case, 172 U. S. at 182, where the Court, referring to the *Roberts* case,

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*Petitioner's reliance (p. 11) on administrative rulings to limit the well-settled incidents of a limited fee estate is not persuasive in view of the total absence of case support and the 43-year gap between passage of the statute and the first administrative construction relied upon. Moreover, the self-serving Interior Department rulings are entitled to no greater weight in this context than Union Pacific's long-standing practice [R. 14] of reserving mineral rights when subleasing portions of the right of way. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 789 (2d Cir. 1946), aff'd, 328 U. S. 275. The 1930 Act of Congress relied upon by petitioner (p. 11) is even further removed from the 1862 grant than the administrative rulings, and it, too, is a "self-serving declaration." *Great Northern Ry. Co. v. United States*, 119 F. 2d 821, 827 (9th Cir. 1941), aff'd, 315 U. S. 262.

**The United States, of course, was a party in the *Great Northern* case, 315 U. S. 262, and the *Illinois Central* case, 187 F. 2d 374 (7th Cir. 1951), in which the limited fee principle was reiterated.

***See Hart and Wechsler, The Federal Courts and the Federal System (1953), pp. 1122-1125.

152 U. S. 114, said that "The difference between an easement and the fee would not have escaped his [Mr. Justice Field's] attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend on such difference." Indeed, as the Court of Appeals said, "the Supreme Court had a clear understanding of the accepted meaning of the terms 'easement,' 'right of way,' 'limited fee,' and 'fee title' " (Pet. App. A, p. 19), and it used such terms with a discriminating appreciation of their consequences.

The congressional policy reflected in the railroad grants prior to 1871 is explained, as the Court of Appeals emphasized, by the fact that during that period "it was considered of utmost national importance that a railroad be constructed to the west coast of the United States" (Pet. App. A, p. 19). Thus, when the consideration offered by the 1862 Union Pacific Act did not induce investors to undertake the project—which was then considered extremely hazardous—Congress promptly increased the aid offered. See Sec. 4 of the Act of July 2, 1864, 13 Stat. 356. In view of the circumstances which existed when the 1862 Act was passed,* it is not surprising that the Supreme Court has stated that the grants made by that Act are not to be regarded as "bestowing bounty on the railroad" or as a "gratuitous reward," but rather as consideration earned as a result of the contractual relations established by the Act. See *Nadeau v. Union Pacific R. Co.*, 253 U. S. 442, 444; *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 679-680.

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*The Court of Appeals referred to these circumstances by quoting from *United States v. Union Pacific R. Co.*, 91 U. S. 72, 79-80. See Pet. App. A, p. 20 n.

A "very important part" of that consideration was the right of way granted to the railroad. See *Railroad Company v. Baldwin*, 103 U. S. 426, 430.

4. Petitioner's principal argument (pp. 8-13) is that a "special minerals policy" makes it necessary for the Court to read into the 1862 right of way grant a reservation of the mineral rights to the United States. This argument reflects the fact—which petitioner does not dispute—that there is nothing in the Union Pacific Act which excepts either mineral rights or mineral lands from the right of way granted. While there is an exception of *mineral lands* from the grant of the alternate sections in Section 3 of the Act, petitioner concedes (p. 12) that this exception could not apply to "the right of way which had to follow a reasonably straight line" and obviously could not jump over or go around mineral lands. Thus, to support its argument, petitioner must establish that a congressional policy of granting the fee and reserving *mineral rights* was inherent though not expressed in the 1862 right of way grant.

The court below, sitting in a circuit where there is special familiarity with mineral rights problems, decisively rejected this "special minerals policy" argument on the ground that it was not until the Stock-Raising Homestead Act of December 29, 1916, 39 Stat. 862, that the congressional policy of conveying the fee and reserving minerals to the United States was fully developed (Pet. App. A, p. 25). The accuracy of this holding is shown

both by the legislative history and the historical background of the Stock-Raising Homestead Act. See 54 Cong. Rec. 687 (remarks of Congressman Mondell); *United States v. Price*, 111 F. 2d 206, 207 (10th Cir. 1940); *cf. Anderson v. McKay*, 211 F. 2d 798, 802-803 (D. C. Cir., 1954), cert. denied, 348 U. S. 836.

The Court of Appeals also pointed out that petitioner's minerals policy argument attempts to distort an alleged policy of excepting *mineral lands* from a general grant of lands into a policy of reserving *mineral rights* in lands to which a limited fee was granted (Pet. App. A, pp. 24-25).* Thus, *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, and *United States v. Sweet*, 245 U. S. 563, cited by petitioner (pp. 9-10), pertain only to the policy of excepting mineral lands from certain land grants. Similarly, the provision in Section 3 of the Union Pacific grant referred to by petitioner (p. 10) is an exception of "mineral lands." And the portion quoted from the debate on the Act (p. 10) again relates to an exception of mineral lands, not mineral rights. Even petitioner's repeated use of the imprecise phrase "mineral wealth"

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*The important distinction between an exception of mineral lands from a grant of lands and a reservation of mineral rights in lands granted was noted in *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 683-684, where the Court, in referring to the exception of mineral lands from the grant of alternate sections adjacent to the right of way, said: "It was not a mere reservation of minerals, but an exclusion of mineral lands . . ."

(pp. 10-12) cannot bridge the gap between an exception of mineral lands and a reservation of mineral rights.*

Reference to the minerals policy prevailing in 1862 will show that the grant to the railroad of a limited fee carrying with it the right to take the minerals was fully in accord with that policy. Although there was no general statute for the disposal of mineral lands prior to the Act of July 26, 1866, 14 Stat. 251, earlier legislation dealing with specific minerals indicates that throughout the Nineteenth Century the policy was to encourage the exploration and development of mineral resources.** In accordance with this policy of encouraging mineral development, the United States "assented to the general occupation of the public lands for mining" and recognized the possessory

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*It is far from clear that even the policy of excepting mineral lands had crystallized by the time of the Union Pacific grant. *Work v. Louisiana*, 269 U. S. 250, holds that there was no policy of excepting mineral lands in 1850. The *Sweet* case, 245 U. S. 563, holds that there was such a policy at the time of the school land grant to Utah of July 16, 1894. Thus, the policy crystallized sometime between 1850 and 1894. The *Sweet* case suggests that the policy did not in fact crystallize until after 1864 by the statement that a series of Acts adopted between 1864 and 1873 "taken collectively . . . . constitute a special code" reserving mineral lands from disposition except under laws especially including them. (245 U. S. at 571.) It seems likely that a general policy with respect to exception of mineral lands became fixed no earlier than the passage of the Act of July 26, 1866, 14 Stat. 251, which was the first general legislation establishing special rules and regulations for the disposition of mineral lands.

**At first Congress sought to accomplish this by providing that the President might lease lands containing salines and lead, but this practice was abandoned at an early date in favor of disposing of these lands outright to states and private parties. Compare the Act of March 3, 1807, 2 Stat. 445, 446 (authorizing leases of lead mines and salt springs), with the Act of March 3, 1829, 4 Stat. 364 (providing for the sale of lead mines in Missouri).

rights of miners who discovered minerals on the public domain. See *Atchison v. Peterson,* 20 Wall. 507, 512; *Del Monte Mining Co. v. Last Chance Mining Co.,* 171 U. S. 55, 62. Moreover, during the Nineteenth Century it was the policy of Congress to dispose of mineral lands at nominal prices and without reserving royalty. See *Union Oil Co. v. Smith,* 249 U. S. 337, 349; *Mining Co. v. Consolidated Mining Co.,* 102 U. S. at 173.

Reflecting this policy of encouraging mineral development, this Court in *Atchison v. Peterson,* 20 Wall. 507, 512, indicated that the exception of mineral lands in certain grants was for the purpose of keeping such lands open for mineral exploration rather than having them occupied for agricultural purposes. The exception of mineral lands in the grant to Union Pacific of alternate sections adjacent to the right of way was in accordance with that purpose. However, since Union Pacific is entitled to exclusive use and possession of its right of way, the objective of keeping mineral lands open to development would not have been accomplished by reserving minerals from the right of way. On the contrary, the best way to insure the development of the mineral resources within the right of way was to grant the fee, including the minerals, to the railroad.*

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*It is an apparent *non-sequitur* to argue, as petitioner does (p. 11), that because mineral lands were excepted from the grant of alternate sections to the railroad, Congress must have intended to reserve the "mineral wealth" from the grant of the right of way.

To show that there was no policy of reserving mineral rights in 1862, the Court of Appeals properly relied on *Barden v. Northern Pacific R. Co.*, 154 U. S. 288, and *Burke v. Southern Pacific R. Co.*, 234 U. S. 669 (Pet. App. A, p. 25). In *Barden* the Court held that the exception of mineral lands from the grant of alternate sections applied to lands not known to be mineral at the time of the enacting statute but found to be mineral prior to the issuance of a patent and the passage of title. However, in *Burke* the Court held that if a patent had issued to the railroad for the alternate sections, complete title, including all minerals subsequently discovered, passed to the railroad notwithstanding the statutory exception of mineral lands.

The basic principle established by the *Barden* and *Burke* cases is that under these railroad grants, once title has passed to the railroad, the Government loses all claim to the minerals. This rule applies irrespective of whether there is a patent. The decision in *Shaw v. Kellogg*, 170 U. S. 312, makes it clear that "there is no magic in the word 'patent,'" and that where Congress makes no provision for a patent, none is essential. 170 U. S. at 341, 343. The decisive factor is whether title has passed and "in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued." *Ibid.* It is settled that title to the right of way passed to the railroad at least "upon the construction of the road," if not earlier. *Missouri, Kansas, & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 116; *Stuart v. Union Pacific R. R. Co.*, 227 U. S. 342. The Union Pacific Railroad was

actually constructed, as required by the act of Congress, more than 85 years ago. On a parity of reasoning to the *Barden, Burke* and *Kellogg* cases, it follows that when title to the right of way passed to the railroad, the title included the minerals and was not subject to any implied reservation of mineral rights.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

LOUIS W. MYERS,
WILLIAM W. CLARY,
WARREN M. CHRISTOPHER,
433 South Spring Street,
Los Angeles 13, California,

JOHN U. LOOMIS,
202 East 18th Street,
Cheyenne, Wyoming,
Attorneys for Respondent.

FRANK E. BARNETT,
W. R. ROUSE,
J. H. ANDERSON,
Of Counsel.